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PRELIMINARY STATEMENT

In the Matthew E. McMillan's Rebuttal to the Judicial Qualifications Commission's Reply Brief, the following symbols will be used:

"JQC" – Judicial Qualifications Commission

"T" – transcript of hearing before the Commission Panel

"Exh" – Defense Exhibits filed at the Final Hearing

"App" -- Appendix

"FCR" – Findings, Conclusions and Recommendations by the JQC Hearing Panel

"Res" – McMillan's Initial Response to the Court's Order to Show Cause

"Rep" – Judicial Qualifications Reply Brief

IN THE SUPREME COURT OF FLORIDA

INQUIRY CONCERNING A JUDGE,
Nos. 99-10 & 00-17, Matthew E. MCMILLAN : CASE NO.95,886 &00-703

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ÅÅâCùdon't remember.'" (T.412-13);
(4) Wells then acknowledged he testified in deposition he endorsed Brown because of statements McMillan made in their May 1998 meeting about "the number of hours Brown was working." However, McMillan's inquiry as to Brown's time in court didn't take place until months after the meeting with Wells. (T. 1235);
(5) When reminded of this, Wells then stated he recalled McMillan complaining at their May meeting that Rick DeFuria had been black-balled for running against a sitting Judge (T. 399). However, DeFuria did not announce his candidacy until July, three months after the meeting in question. (App B: Exh.1,3,4 - July 1998 newspaper articles relating to DeFuria's announcement and firing.)

The JQC has ignored the evidence in their finding of guilt on this charge. [1]

CHARGE 3; PART II – Pressuring Law Enforcement

The police officer letter reads "**Many of you have come to me with stories** of how he has…pressured you to give preferential treatment to his children when they were arrested…" *(emphasis added.)* The JQC's Reply falsely states that McMillan recklessly and "belatedly attempted to disavow the statement," (Rep.16). Judge McMillan's explanation was neither reckless nor belated, nor was it a disavowal. It was simply a correct description of the letter.

The JQC has repeatedly mischaracterized both the testimony of Dep. Dawn Atkinson and the incident in question. The Panel calls it *"two young people fighting or engaged in a prank in the Brown home.*"(RCR.21). The Reply states it was *noncriminal "horseplay between children."*(Rep.14) Dep. Atkinson, dispatched to take the complaint, recalled that she learned Judge Brown's **adult** son had held a 12 year old neighbor's head in the toilet. (T.709) She stated she took the report from the victim's mother, and then she received a message at work from Judge Brown telling her to call him, leaving both his home and work numbers. She felt uncomfortable calling him at home, so she returned his call at the office. (T. 711).

Dep. Atkinson stated in her opinion Brown was "demeaning and intimidating" when she returned his call. (T. 711-712). "He became angry right away. 'Why

[1] The JQC dismissed this portion of Charge 3 entirely in the 01/17/01 Stipulation.

didn't you call me? Why didn't you -- before you turned this report in, why didn't you get his side of the story?'" (T. 740) She explained it was not proper protocol for her to call the father of an adult suspect prior to turning her report in (T. 712). When she told him that, he said "'My son is going into the Marines, and this is going to mess everything up.'" (T. 712-713) She imitated his angry tone of voice in an effort to convey to the panel the level of intimidation he imparted.

She testified as to the repercussions that followed: **From that point on**, Judge Brown's sentences on her cases "were either lax or dismissed or adjudication withheld." "And that was the only judge that I've had that kind of...problem with."(T.713-14). This discriminatory treatment continued until it became so severe that Dep. Atkinson preferred to dismiss her cases than appear before Judge Brown, so as not to "[waste] my time or his time or the defendant's time." (T. 714 - 715.)

She testified that she kept this incident to herself until she ran into McMillan at a dry cleaner and related the incident to him. While conceding that Brown did not specifically say the words: "Give my son given preferential treatment," she testified she did have the clear impression that he was seeking preferential treatment when he made the call to her, and she related that impression to McMillan. (T.752-3).

The JQC again misstates the record, falsely asserting that Atkinson testified "*clearly that Brown's **only statement** was that she failed to take any statements from his son*." (FCR.21) The Reply states that "the Panel's conclusion rests upon a sound evidentiary basis." (Rep. 15) The record totally contradicts this conclusion.

CHARGE 5 - Fines and Court Costs

Contrary to the position of the JQC, collecting court costs is an administrative matter. (Rep.19) Further, it is disingenuous for the Panel to conclude by circumstantial evidence that Judge McMillan was attacking Judge Brown personally simply because he was running against him. By this logic, any time a challenger makes any statement regarding failures of the court system, it

could be construed as an unfair attack against the opponent, and thus a knowing misrepresentation.

The remaining substance of this charge is thoroughly addressed at Res. 21-26, including the Panel's outrageous assertions that the Clerk's Office figures were either "*known to be extremely inaccurate,*" (FCR.26) or were *claimed by McMillan to be* "*erroneous*." (Rep.27).McMillan conducted exhaustive research using official county documents, and his findings as to the failure of the local judiciary, as well as Judge Brown, to adequately collect fines, court costs and restitution were undisputed and independently confirmed by experts such as statisticians, accountants and researchers. The exhibits illuminate the remarkable and extraordinary improvements resulting from McMillan's collection methods over that of his predecessors. The Court is urged to review the graphs in App. C, and the underlying research and expert testimony in App. D, confirming that the data was "extremely accurate," "true to county documents," and "undisputable mathematically".

CHARGE 6 – George Brown's Work Ethic

This charge was thoroughly addressed in Judge McMillan's Response (pp.26-42), but the following issues require reiteration:

1) The JQC condemns Judge McMillan for maintaining that his criticisms of Brown's work ethic were truthful. (Rep.47) Extensive court records independently verified notwithstanding (T.986;Exh.237;App.E), numerous witnesses unconnected with candidate McMillan testified as to Brown's poor work ethic (see App. F), specifically, that he was regularly seen at home during normal working hours, seen arriving late, and often seen leaving the courthouse early in the day without returning. In fact, he was awarded the "Caspar the Friendly Ghost Award" by the Bar's Young Lawyers' Division due to his well-established

reputation.(T.1160) Even his own campaign advisor, Mr. Sharff, described him as "'lazy'" and '"not hard-working'"(T.892), but took the 5th Amendment in deposition when queried.

2) The JQC claims McMillan's decision to focus upon County Court only and exclude early morning advisories when calculating days off from court was a deliberate attempt to mislead the public. What is truly misleading is the JQC's attempt to portray the 30-45 minutes Brown sometimes spent in early morning advisories as a full day in court (Rep.28, App.at 14), when in fact he held no county court between 8:30 and 5:00 and very well may have gone home for the day. (AppF)

3) The JQC refuses to acknowledge that McMillan's intended message was clear and corroborated: Brown spent less time in court in relation to other judges in comparable positions statewide measured by the **same criteria** including the **exclusion of advisories** when calculating days off from court.[2] Mrs. McMillan testified that in order to ensure the reliability of the method used to calculate Brown's court time, identical docket research was conducted on Judge DiVilbiss (App.E: Exh.13), a judge in a neighboring county with a comparable caseload, as well as a statewide survey. (App E: Exh. 13, 14). Then, as to Exh.15, she testified:

"We charted out the other judges' time in court [based upon a statewide survey, Exh. 14] and how it compared to Judge Brown just to make sure that we were being fair and basing our criticism of him in comparison to other judges. Not that he was taking vacation time not that he wasn't in the courthouse, but that compared to other judges with similar case loads and similar positions, he was spending less time in court than they were. And I just want to say we did our best. It was extremely tedious, and we were trying to be accurate, and we thought we had a valid point." (T. 803)[3].

An 8/13/98 newspaper article also supports McMillan's contention, stating:

> "McMillan took issue with Brown's record at times, for example citing research that showed him to put in only 12 hours of time holding court per week. McMillan compared that unfavorably with other judges in comparable positions in other counties." (Exh 16)

4) The record is clear that McMillan instructed Tom Nolan to change the Part-time Problem brochure to reference the survey results of other judges' court time and delete the "over-loaded system" phrase. (Res.35) McMillan testified that had his instructions been obeyed, the brochure

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[2] The JQC's reliance on Brown's personal calendar is dubious (FCR 29) It was proven discrepant with official court records, with other judges often presiding over Brown's purported docket. (T. 808-813)

[3]Even when advisories are excluded for Judge DiVilbiss, just as they were for Brown, DiVilbiss shows 34 days off from court in '97, compared to Brown's 84. If advisories had been counted as full days in court, as the JQC portrays at Rep. 28 & JQC App. Tab 14, the public would have been deceived into believing Brown actually spent more time in court than DiVilbiss and had a similar work ethic.

would not have been as open to misinterpretation. Thus "If I could take this back, I would. If I misled anyone, that was not my intent".(App L:T.1403). As Nolan had previously testified the brochure was faulty due to his failure to correct it after being so instructed,[4] it lends little to the JQC's position to point out that Nolan and Jesse Carr interpreted the brochure as leading voters to believe that Brown had not been working at all on 84 and 86 days.

5) The record is replete with the testimony of Judge McMillan acknowledging that his brochure could be misinterpreted by the public (T.1404) and expressing his sincere remorse for his poor and inartful choice of words, particularly regarding "days off from court." (App. L: T. 1403, 1404, 1406, 1408, 1424, Res.39-41)

CHARGE 7 – Overloaded Court System

The defense to this charge is addressed in McMillan's Response. The JQC completely ignores Nolan admitting he was instructed to delete this phrase (T.1040-1, 1044) yet failed to do so,[5] and finds a knowing and intentional misrepresentation.

CHARGE 8 – Prostitution Sentences

McMillan concedes there is no statute governing prostitution relocation, but rather, it is a routine condition of probation which Brown failed to use even once during his 16 year tenure (App. C p.2; App. D: Exh. 44-48). McMillan submitted the documents on which his mistaken deduction was based (App. G), and concedes his error, not with regard to Brown's sentencing practices per se, but with regard to the existence of a relocation statute, which he first learned was an issue at trial. The JQC insists he acknowledge the mistake was a knowing misrepresentation.(Rep.30)[6]

CHARGE 9 – Vincent Born

This charge is fully addressed at McMillan's response (45-47) and App. H. Again the JQC demands 100% accuracy and any mistake is automatically intentional, chilling fee speech and meaningful debate to the point of nonexistence.[7]

CHARGE 10

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[4]When Nolan's testimony is read in its entirety, he clearly states McMillan's message was "that Judge Brown didn't spend enough time in Court," that "he was not presiding in court on those 84 days," and days off from Court does not necessarily mean someone is not working. (T. 1092-3). Jesse Carr's testimony, when read in its entirety, conveys that Carr misunderstood the point of the question posed, interpreting "not at work" to mean "[not] utilizing the taxpayers' money to do something for the taxpayers;" not that he wasn't in the building. (T.1327)

[5] McMillan takes responsibility for any errors of his staff. (See App L: T.1266,1293)

[6] The JQC posits if a mistake is made, wherein the accused could have found the correct information, the mistake must be intentional. Given this logic, law libraries are filled with books recording the intentional misapplication of the law by judges!

[7] The JQC dismissed the portion of Charge 8 dealing with the misrepresentation of domestic battery offenders, of which Vincent Born was one. Again, McMillan did not misrepresent the incumbent's sentencing practices per se, but erred in choosing Born as an example, a mistake for which he has accepted responsibility and admitted regret. (App. L: T. 136-7, T.1266)

The charge stems from McMillan's response to Brown's campaign flyer (App.B Exh.94).The JQC states McMillan suggests to the public that a judge's reputation for leniency is the "only reason" for a small number of jury trails. (Rep.35) McMillan never made such a statement either in his brochure or his testimony. Of course many factors affect the number of trials held, but it is common knowledge and logic that a more lenient judge, one prone to accept whatever plea deals attorneys negotiate no matter how light the sentence, will have fewer trials.

CHARGE 11

The JQC asserts it was proper to find McMillan guilty of this "catch-all" charge. However, the campaign occurred in 1998. If McMillan had continued, post-election or since taking the bench, to produce and distribute literature or make public statements insulting or demeaning to the judiciary, then the JQC could properly claim that he has engaged in a *continuing pattern of misconduct*.[8] However, there has been absolutely no evidence that Judge McMillan has been hostile to or critical of the judiciary since taking the bench.. There is ample testimony, however, that he has worked tirelessly to make changes (App J) that have bolstered the public perception of the judiciary, and that his courtroom demeanor has been exemplary. (See App I: Public Confidence and App. K: witness testimony)

The Ocura Matter

Judge McMillan has expressed remorse over the Ocura matter, readily acknow-ledges he should have been more circumspect (T. 189,190, 184), has taken steps to ensure he never repeats this type of error (T. 1397, 1427), and does not contest he offered to assist Judge Farrance. However, he takes issue with the JQC's finding of lack of candor, which is based upon their acceptance of the conflicting testimony of Farrance.[9] (FCR.35) In attempting to bolster Farrance's version, the JQC misrepresents the record, falsely stating *"Both Ms. Rosas and Judge Farrance testified that Judge McMillan initiated the conversation [between McMillan and Farrance] (T. 3-478)"* (Rep 43). In truth, Rosas was never asked who initiated the conversation, nor did she offer such testimony. In fact, when asked by Mr. Barkin if she heard the conversation in question, she responded "They were…in the doorway and I wasn't paying attention to what they were saying."(T.478)

The mitigation surrounding the Ocura matter has been thoroughly addressed at Res. 55-64, however the Court is urged once again to look askance at the entire JQC Reply; a report which incorrectly cites

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[8]This is a misapplication of law. Unless charged with racketeering or conspiracy, it is improper to charge each incident individually and then again as a whole.

[9] Although Farrance testified he was already seated to begin advisories when approached by McMillan and that they did not have a conversation in the doorway regarding his preparedness for trial, he is directly contradicted by not only McMillan and Valerie Rosas, (Ocura Exh.12, T.474-5, 477-8), but also prosecutor Steve Viana.(T.1382). When confronted with the conflicting testimony in Rosas' affidavit, (Ocura Exh. 12), Farrance responded "She had a different position, I guess."(T.297) Even Mr. Barkin recognized Farrance's version was incorrect (T.181,lines 5-6).

testimony in an apparent effort to increase the likelihood that their recommendation will be approved.[10]

The JQC Reply supports its argument for removal with Judge Gallen's testimony. This is remarkable since the Panel fails to even mention Gallen's name in its 42-page Findings. Gallen, who testified in deposition McMillan was fit then filed an amicus brief opposing the 1/17/01 Stipulation, and who has never observed McMillan in court, was impeached on almost every point of his testimony. Most notably, during the trial, he evidently attempted to violate the Court's order of sequestration by having audio/video cables run from the courtroom directly into his personal hearing room. The plot was foiled when a county employee came forward. Steve Smead, the county telecommunications technician, testified he was instructed "not to say anything" if asked what he was doing. (T.692-3) Gallen further compounded his deception by denying under oath any knowledge of the incident.(T.540) Apparently, the Panel found his testimony as a whole lacking in credibility and of no value.

Witnesses with actual knowledge of Judge McMillan's courtroom demeanor and performance testified, providing overwhelming evidence of his fitness for office. (App. K). Additionally, evidence was submitted showing his tenure has significantly increased pubic confidence in the judiciary. (App. I, J) During the final hearing, Panel Member Booth said: **"…It's just so commendable. And I'm just asking if you expect every judge to be as zealous and as creative and to work so hard and as many hours as you do, or are you always going to be the exception?"** (T. 1427) It is the dedication of Judge McMillan, evinced in this single question, that should make this Court reluctant to remove this courageous and outstanding judge. The respondent respectfully requests that the Court reject the recommendation of the JQC.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via hand delivery to Marvin E. Barkin, Esq., 101 E. Kennedy Blvd., Suite 2700, Tampa, FL 33602, via Federal Express to John Beranek, Esq., 227 S. Calhoun St., Tallahassee, FL 32301, via hand delivery to Thomas C. McDonald, Jr., 100 N. Tampa Street, Suite 2100, Tampa, FL 33602, via hand delivery to Scott Tozian, Esq. 109 N. Brush St., #150, Tampa, FL 33602, via hand delivery to Lance C. Scriven, Esq., 633 N. Franklin St., Suite 600, Tampa, FL 33602 via Federal Express to Brooke Kennerly, Florida Judicial Qualifications

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[10] The JQC states "McMillan refused to express any regret (T. 1-127)" regarding his support for police officers' efforts. (Rep.47) The Court is urged to read the testimony in its entirety (App L: T.126-7) and note the mischaracterization of the record from which the JQC recklessly concludes all other expressions of regret found in App. L are negated.

Commission, Room 102, The Historic Capitol, Tallahassee, FL 32399 and via Federal Express to the Florida Supreme Court, Supreme Court Clerk's Office, 500 S. Duval Street, Tallahassee, FL 32399-1927, this ____ day of March, 2001.

LEVINE, HIRSCH, SEGALL & BRENNAN, P.A.

By:_____

Arnold D. Levine, Esq.
Fla. Bar No. 046869
100 S. Ashley Drive, Suite 1600
Tampa, FL 33602
813/229-6585
Attorney for Respondent

CERTIFICATE OF COMPLIANCE

I CERTIFY that the Brief complies with the font requirements of Rule 9.210, Fl.R.App.P. The font used in this matter is Times New Roman 14.

_____

Arnold D. Levine, Esquire